BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KERRI C. MCGAHEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,895
SECURITY BENEFIT GROUP, INC.	)	
Respondent	)	
AND	)	
	)	
CHUBB INDEMNITY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 23, 2009 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ awarded claimant benefits[1] after concluding claimant sustained an accidental injury in July 2009 that arose out of and in the course of employment with respondent.[2]

The respondent requests review of this preliminary hearing Order and alleges that claimant's July 30, 2009 accidental injury was either a natural and probable consequence of her original 2005 ankle injury or resulted from a normal activity of day-to-day living.

Claimant requests the Board affirm the ALJ's preliminary hearing Order, arguing that the July 30, 2009 accidental injury was a "new injury" which aggravated a preexisting condition.

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[1] Claimant was awarded medical treatment with Dr. Gilbert until further order.

[2] ALJ Order for Medical Treatment (Dec. 23, 2009) at 1.

The issue for review is whether the injury claimant sustained on July 30, 2009, arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The claimant testified that on July 30, 2009, she was walking up stairs at work when she made the turn on the landing and her left ankle snapped.[3] After her ankle "snapped" claimant was transported to the hospital by ambulance. She was treated by Dr. John H. Gilbert, II, who diagnosed claimant with a left ankle sprain, status post open reduction and internal fixation of the left ankle with some mild degenerative disease.[4]

In a letter to respondent's wellness nurse, Dr. Gilbert opined:

> While her injury does represent a new injury, I believe it represents an exacerbation or aggravation of a pre-existing condition, degenerative arthritis in the Left ankle, which is a sequelae of her previous injury and as such her current injury can be considered a consequence of the injury of 2004.[5]

It is uncontroverted that claimant had a prior work-related left ankle injury in 2005. This injury involved a severe fracture to two separate bones and required surgical hardware to be placed in her left ankle. Some of the hardware was removed in October 2006; however, a pin still remains in her left ankle. Claimant received no further treatment and experienced no problems other than occasional swelling with her left ankle from October 2006 until July 30, 2009.[6]

Additionally, Dr. Gilbert's July 31, 2009 notes from his examination of the claimant indicate that a review of x-rays reflected that the fracture line from the 2005 injury was remote from the current left ankle sprain.

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[3] P.H. Trans. at 8.

[4] *Id.*, Cl. Ex. 1.

[5] *Id.* Dr. Gilbert mistakenly refers to the original injury as occurring in 2004. The original injury occurred in 2005.

[6] P.H. Trans. at 8, 10 and Resp. Ex. A at 12.

In order for a claimant to collect workers compensation benefits she must suffer an accidental injury that arose out of and in the course of her employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[7]

The ALJ concluded claimant's July 30, 2009 accidental injury did arise out of and in the course of her employment with the respondent, reasoning the injury was a consequence or aggravation of claimant's prior work-related injury.

The only medical opinion in the record to date is that of Dr. Gilbert. His opinion is confusing and less than clear. Review of his July 31, 2009 note offers some insight into his opinion. The note indicates that the current injury is remote from the 2005 fracture line. In addition, Dr. Gilbert's opinion letter first and foremost opines the current injury is a new injury. Based on the evidence compiled to date, the injury is determined to be a new injury unrelated to the 2005 injury.

Since the injury is deemed to be a new injury, respondent's arguments challenging the natural and probable consequence reasoning employed by the ALJ is moot and need not be further addressed.

Respondent also asserts that even if claimant's left ankle condition is deemed a new injury, the injury was a result of activities of daily living, which does not qualify as a personal injury pursuant to K.S.A. 44-508(e).

K.S.A. 2009 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

[7] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

A close reading of the statute reveals a reference to disability (not injury) which results from normal activities of day-to-day living. The respondent's argument fails to note the use of the word "disability" in this reference rather than "injury."

A definition of "disability" cannot be found in the Workers Compensation Act. The Kansas Supreme Court in *Boeckmann*[8] found the claimant's disability was caused by his everyday activities. The medical evidence in *Boeckmann* showed that with every breath he took, his degenerative hip condition was getting worse. Thus, his disability was not caused by an injury but rather his disability was caused by being alive. Consequently, workers compensation benefits were denied.

More recently, the Kansas Court of Appeals in *McCready*[9] noted the use of the word "disability" in K.S.A. 44-508(e).

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee *suffers disability* as a result of the natural aging process or by the normal activities of day-to-day living.
>
> It is important to point out that the statute refers to a disability (not the injury) which is a result of the natural aging process or normal activities. . . .[10]

There is no evidence in the record compiled to date that suggests claimant suffers a disability as a result of the aging process or activities of day-to-day living. Neither party alleges a disability nor does Dr. Gilbert opine that claimant suffers a disability as a result of the normal aging process or normal activities of day-to-day living.

After reviewing and considering the parties' briefs, the administrative file and the record compiled to date, this Board Member affirms the ALJ's Order for Medical Treatment albeit for different legal reasoning.

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[8] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[9] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

[10] *Id.*, at 90 (alteration in original).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the December 23, 2009 preliminary hearing Order for Medical Treatment entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[11] K.S.A. 44-534a.